STATE OF MICHIGAN

COURT OF APPEALS

DENNIS RAYMOND,

Plaintiff/Cross-Defendant/Cross-Plaintiff-Appellant/Cross-Appellee,

v

RON HOLLIDAY and NANCY HOLLIDAY,

Defendants/Cross-Plaintiffs/Third Party Plaintiffs-Appellees,

v

RICHARD E. VERBURG and SUZANNE G. VERBURG,

Cross-Defendants/Third Party Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
June 21, 2011

No. 297146
Mecosta Circuit Court
LC No. 08-018598-CK

Before: TALBOT, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

Dennis Raymond contends the trial court erred in granting summary disposition in favor of the Hollidays (Ron and Nancy Holliday) and the Verburgs (Richard E. and Suzanne G. Verburg) and denying his motion for reconsideration in this property case involving building density deed restrictions. Raymond and the Verburgs also challenge the trial court's calculation of the damage award in favor of Raymond. We affirm.

Raymond initially contends the trial court erred in granting summary disposition because the issuance of the Holliday/Verburg warranty deed, which does not explicitly reference the building density restriction, supersedes the land contract and memorandum of land contract under the doctrine of merger. The land contract and memorandum of land contract both detailed the building density restriction and the memorandum of land contract was filed with the register

of deeds. This Court reviews de novo a trial court's decision on a motion for summary disposition.[1] "Whether the merger doctrine applied to preclude the trial court from considering the parties' prior negotiations and agreement is a question of law," which is also reviewed de novo.[2]

According to the merger doctrine, "a deed made in full execution of a contract for the sale of land is presumed to merge the provisions of a preceding contract pursuant to which it is made, including all prior negotiations and agreements leading up to execution of the deed. . . ."[3] "[T]his rule is not absolute," as recognized exceptions to the merger doctrine exist.[4] One such recognized exception occurs "where delivery of the deed represents only partial performance of the preceding contract, the unperformed portions are not merged into it."[5] In addition, "the equitable power to reform a deed is an exception to application of the merger doctrine."[6] Specifically, "where the proofs warrant it, a court sitting in equity might reform a deed notwithstanding the doctrine of merger."[7] The parties do not dispute the applicability of the merger rule to land contracts.[8]

The land contract specifically provided:

> Upon full final payment of the principal and interest of this Contract within the time and manner required by this Contract, together with all other sums chargeable against the Buyer, and upon full performance of the covenants and agreements of the Buyer, the Seller shall convey the Premises to the Buyer . . . by Warranty deed, subject to easements and restrictions of record and free from all other encumbrances except those, if any, as shall have been expressly assumed by the Buyer. . . .
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[1] *Barnard Mfg, Inc v Gates Engineering Co, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

[2] *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 374; 761 NW2d 353 (2008).

[3] *Id*. at 374-375, quoting *Goodspeed v Nichols*, 231 Mich 308, 316; 204 NW 122 (1925).

[4] *Johnson Family Ltd Partnership*, 281 Mich App at 375.

[5] *Id.*, citing *Goodspeed*, 231 Mich at 316; see also, *Chapdelaine v Sochocki*, 247 Mich App 167, 171; 635 NW2d 339 (2001).

[6] *Johnson Family Limited Partnership*, 281 Mich App at 375.

[7] *Id.*

[8] *Mueller v Bankers' Trust Co of Muskegon*, 262 Mich 53, 57; 247 NW 103 (1933).

> Seller to allow buyer to remove trees obstructing building site one building (residence) per 10 acre parcel allowed.
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> The terms of this Contract shall bind the heirs, assigns, and successors of the respective parties.

As explained by our Supreme Court in discussing the doctrine of merger and exceptions thereto:

> Where, however, the deed constitutes only part performance of the preceding contract, other distinct and unperformed provisions of the contract are not merged in it. And where a contract of sale provides for the performance of acts other than the conveyance, it remains in force as to such acts, until full performance.[9]

Similarly, the Court has recognized:

> There is a class of cases . . . where it is held that if the preliminary contract contains a stipulation of which the conveyance is not a performance, such stipulation survives and is not merged in the deed. In other words, the deed effects a merger to the extent that it is contemplated that a deed shall be a performance of the contract.[10]

In the factual circumstances of this case, and consistent with case law regarding the doctrine of merger and its exceptions, the covenant restricting building density on this land was collateral to the contract for the deed and constituted an obligation independent of conveyance of title. As such, the warranty deed did not serve to extinguish the covenant to restrict the construction of additional buildings on the property.[11]

Raymond further contends that his status as a good faith purchaser precludes enforcement of the building restriction. A good faith purchaser is "one who purchases without notice of a defect in the vendor's title."[12] Notice may be either actual or constructive. The definition of notice is:

> When a person has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries concerning the possible rights of

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[9] *Mueller*, 262 Mich at 58, quoting *Goodspeed*, 231 Mich at 308.

[10] *Id.* at 57 (citations omitted).

[11] *Id.* at 58.

[12] *Richards v Timbaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006).

> another in real estate, and fails to make them, he is chargeable with notice of what such inquiries and the exercise of ordinary caution would have disclosed.[13]

A title search was undertaken but failed to disclose the memorandum of land contract, which was a recorded document. While Raymond may have a viable action against the title company for their failure to thoroughly investigate the property and the records maintained by the Register of Deeds, it does not alter the fact that language existed in the Holliday/Verburg deed and the Verburg/Raymond deed indicating conveyance of the property was "subject to easements and building and use restrictions of record." This language was sufficient to place Raymond on notice of the need to make further inquiry and precludes his status as a good faith purchaser. Specifically:

> Any contract executed and acknowledged . . . shall . . . be entitled to be recorded in the office of the register of deeds of the county where the lands lie, and the recording of the same shall have the same force and effect, as to subsequent encumbrancers and purchasers, as the recording of deeds and mortgages as now provided by law.[14]

Consequently, the memorandum of land contract was sufficient to provide notice of the building restriction on this property.

In challenging the intent of the parties regarding the permanency of the building restriction, Raymond impliedly suggests that this particular covenant should not be construed to "run with the land" suggesting that it was merely a personal agreement between the Hollidays and Verburgs for the term of the land contract. In defining what comprises a covenant running with the land, this Court has stated:

> The essentials of such a covenant . . . have been stated to be that the grantor and grantee must have intended that the covenant run with the land; the covenant must affect or concern the land with which it runs; and there must be privity of estate between the party claiming the benefit and the party who rests under the burden.[15]

The test to be applied in determining whether a covenant runs with the land or is merely to be construed as a personal obligation,

> is whether the covenant concerns the thing granted and the occupation or enjoyment of it, or is a collateral and personal covenant not immediately concerning the thing granted. If a covenant concerns the land and the enjoyment

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[13] *Id.* at 539 (citation omitted).

[14] MCL 565.354.

[15] *Greenspan v Rehberg*, 56 Mich App 310, 320-321; 224 NW2d 67 (1974) (citation omitted).

> of it, its benefit or obligation passes with the ownership; but to have that effect the covenant must respect the thing granted or demised and the act to be done or permitted must concern the land or the estate conveyed. In order that a covenant may run with the land, its performance or nonperformance must affect the nature, quality, or value of the property demised independent of collateral circumstances, or must affect the mode of enjoyment.[16]

The building density restriction meets the definition of a covenant that runs with the land and, thus, is to be construed as a permanent encumbrance on the property.

Raymond relies on statements by the Verburgs regarding their intent to subdivide the property as evidencing an understanding that the building restriction did not run with the land. Raymond fails to distinguish the difference inherent between subdividing the property into multiple parcels from construction of residences on those parcels. There is nothing to preclude subdivision of the parcels and no one disputes such a right. But, even if the Verburgs indicated their intent to subdivide the property into multiple parcels, this is not necessarily inconsistent with or contrary to the existence of the restriction to preclude the construction of additional buildings on the sites. These are completely different concepts or actions, and are not indicative of the intent of the parties regarding the permanency of the building restriction.

Ultimately, this Court finds the above "analysis" is effectively unnecessary based on the existence of recorded instruments evincing the building restriction. The memorandum of land contract, which is a document recorded with the register of deeds, specifically indicates "subject to one (1) dwelling per 10 acre parcel only." The very next document to be recorded is the warranty deed conveying the property from the Verburgs to Raymond, which provides that the conveyance is "subject to easements, use, building and other restrictions of record, if any." Although summary disposition was appropriate without the necessity of reformation of the deed, "this Court will affirm where the trial court came to the right result even if for the wrong reason."[17]

Raymond next contends the trial court erred in refusing to grant reconsideration based on information obtained after summary disposition was granted and before the bench trial was conducted indicating the Verburgs and Hollidays did not have the same intent or understanding regarding the permanency of the building restriction. This Court reviews a trial court's ruling on a motion for reconsideration under an abuse of discretion standard.[18] This Court will reverse a

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[16] *Id.* at 321, citing *Mueller*, 262 Mich at 56.

[17] *Fisher v Blankenship*, 286 Mich App 54, 70; 777 NW2d 469 (2009).

[18] *Tinman v Blue Cross & Blue Shield of Mich*, 264 Mich App 546, 556-557; 692 NW2d 58 (2004).

trial court's denial of a motion for reconsideration only if the decision to deny falls outside the range of principled outcomes.[19]

In their motion for summary disposition, the Verburgs argued that restrictions were present in the deed sufficient to place Raymond on notice when viewed in conjunction with the memorandum of land contract that was filed with the register of deeds. Based on the existence of these documents there was no need to reform the actual deed. In explaining its decision to grant summary disposition in favor of the Hollidays and Verburgs, the trial court indicated that the documents and pleadings filed in this case demonstrated the intent of the Hollidays and Verburgs that the building restriction be permanent and run with the land.

After granting summary disposition, Raymond was permitted to file a cross claim against the Verburgs and deposed the Verburgs. In answer to Raymond's cross claim, the Verburgs denied that Raymond had conveyed or indicated to them his intent to divide and sell the property. Rather they asserted that Raymond had merely indicated when negotiating the purchase that he wished to live and hunt on the property. The Verburgs also emphasized, in their answer, that there is no restriction regarding "division" of the property and that they did not make any representations to Raymond pertaining to "development" of the property.

In support of his claim of newly discovered evidence pertaining to the intent of the Verburgs, Raymond points to specific deposition testimony by Richard Verburg suggesting he believed that once the land contract was completed, he would not be restrained from subdividing or constructing additional buildings on the property. The deposition testimony of Suzanne Verburg is consistent with that of her husband regarding denials that Raymond in seeking to purchase the property ever discussed an intent to subdivide and sell the parcels off for further development and that she understood that any restriction on subdividing the property terminated with the successful completion of the land contract. In questioning Suzanne Verburg, counsel was able to refine the testimony to demonstrate that subdivision of the property would allow for alternative uses, such as camping, that would not necessitate running afoul of the building restriction. Raymond contends these deposition responses are contrary to the trial court's determination that the Verburgs and Hollidays had the same intent regarding the permanency of the building density restrictions and that they would run with the land.

Raymond sought reconsideration based on his assertion of newly discovered evidence.[20] The trial court rejected Raymond's request based primarily on its determination that the Verburgs' deposition testimony did not comprise newly discovered evidence, finding "Mr. Raymond had ample time to depose the Verburgs prior to the January 2009 summary disposition hearing; with due diligence this evidence could have been produced earlier."

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[19] *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 630; 750 NW2d 228 (2008).

[20] MCR 2.612(C)(1)(b).

A trial court properly denies a motion for reconsideration when the evidence offered in support of the motion could have, with reasonable diligence, been produced at the time the court made its initial ruling.[21] As recognized by the trial court, the parties were well aware that the intent of the Hollidays and Verburgs was "crucial to the earlier summary disposition determination." Raymond had more than sufficient time to schedule and conduct depositions before the relevant hearing. Postponement of the Verburgs' depositions was contrary to the exercise of reasonable diligence by Raymond. The trial court correctly rejected Raymond's contention that the deposition testimony of the Verburgs constituted newly discovered evidence to set aside the award of summary disposition. Raymond had more than sufficient time to conduct such discovery before the summary disposition hearing. His lack of reasonable diligence in pursuing such discovery, particularly given the recognized importance of the intention of the Hollidays and Verburgs in executing their deed regarding the permanency of the building restrictions, was contrary to the requirements imposed by the relevant subsection of the court rule.[22]

Further, the deposition testimony was not completely "at odds" with the information available to the trial court at the time of the motion for summary disposition. Primarily, the parties reference the ability to partition the property and not the construction of additional buildings. There was no restriction on partition and any indication by the Verburgs later in the proceedings must be viewed, not only within context, but also with regard to what was actually stated rather than assumed by Raymond. As noted by the trial court, while it gave considerable weight to the intent of the parties in granting summary disposition, other factors such as exceptions to the merger doctrine and constructive notice were also found to exist, which were sufficient as alternative bases to support the decision to grant summary disposition.

Finally, Raymond and the Verburgs contest the award of damages. Specifically, Raymond contests the amount of the award and the Verburgs challenge any damage award. In order to preserve a claim that an award of damages is excessive, it is necessary that a party seek remittitur. [23] Any challenge pertaining to the sufficiency of evidence in a civil case is waived if the party does not raise the issue in a timely motion at trial.[24] "In bench trials, this Court reviews the award of damages under the clearly erroneous standard. A reviewing court may not set aside a nonjury award merely on the basis of a difference of opinion."[25] When this Court determines that a trial court was properly cognizant of the issues and correctly applied the law, clear error

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[21] *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

[22] MCR 2.612(C)(1)(b).

[23] *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 315; 660 NW2d 351 (2003).

[24] *Napier v Jacobs*, 429 Mich 222, 238; 414 NW2d 862 (1987).

[25] *Meek v Dep't of Transp*, 240 Mich App 105, 121; 610 NW2d 250 (2000) (citations omitted), overruled in part on other grounds, *Grimes v Dep't of Transp*, 475 Mich 72; 715 NW2d 275 (2006).

will not be found to have occurred as long as the damage award falls within the range of the evidence presented.[26]

The trial court provided a very explicit discussion of the evidence presented pertaining to the value of the property and the method used for calculation of damages. The award of $8,800 was determined by "comparing the claimed offer prices of each of the three subdivided parcels to the price for the total of the three parcels" to develop "a ratio helpful in calculating damages." Applying the ratio against the actual purchase price, the trial court was able to determine the loss of profit by applying the percentage to Raymond's actual purchase price.

The Verburgs' cross appeal seeking the preclusion of any damages is not sustainable. The Verburgs failed to preserve this issue with a motion for remittitur. As a result this Court need only consider the issue if the failure to do so would result in manifest injustice.[27] The Verburgs were remiss in failing to present any substantive documentary evidence pertaining to the value of the property and simply contested the source or validity of figures provided by Raymond. The award by the trial court cannot be construed as being so extreme that it rises to the level of manifest injustice. In effect, the trial court awarded Raymond an appreciation in value of the property of approximately 11 percent over a period of six years premised on the assumption that conveyance of the smaller lots without restriction would have resulted in an increase in value. As the award falls within the range of the only evidence presented, it is not clearly erroneous.

Raymond contends the method selected by the trial court to calculate damages was incorrect and that he should have been awarded $22,500 as the difference between the amounts paid for the property of $80,000 and the purported value of the newly formed parcels of $102,500. Contrary to Raymond's contention, this Court has recognized that more than one method exists for calculating damages.[28]

As recognized by the trial court little substantive evidence was presented by any of the parties regarding the possible value of the property or appreciation in its value. The only figures that could be construed as being somewhat verifiable were the original purchase price and the purported lost sale price of $16,000 for one of the three parcels following division of the property. While Raymond contends that he could have recovered $102,500, the trial court properly recognized that he had received an offer on only one of the parcels, for $16,000, which was $2,000 less than his asking price. As such, Raymond's contention that he would have

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[26] *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995).

[27] MCR 2.611(A)(1)(d); *Pena*, 255 Mich App at 315; *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 640; 734 NW2d 217 (2007).

[28] *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 299; 616 NW2d 175 (2000).

received his full asking price for all three lots is not only contrary to his own evidence, but too speculative for purposes of recovery.[29]

Based on the failure of the parties to present documentary evidence pertaining to the value of the property through actual assessments, appraisals, purchase agreements or other legitimate methods, the trial court sought to use a mechanism that would realistically compensate Raymond for any loss sustained while recognizing the limited evidence regarding anticipated profit based on the discrepancy between the alleged value and actual purchase price offered for the one parcel. The method used by the trial court fulfilled the fundamental purpose of compensating Raymond while commensurately recognizing "that asking prices are not sale prices and do not firmly establish any basis for damages."

Affirmed.

/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

[29] *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997).